Supreme Court, U.S.
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No. 95-135

In the Supreme Court of the United States

OCTOBER TERM, 1995

WERNER H. ERHARD, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Tax Court judge to whom this case was assigned made the decision for the court in this case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985)	7
Colorado v. *New Mexico*, 467 U.S. 310 (1984)	8
Freytag v. *Commissioner*:	
904 F.2d 1011 (5th Cir. 1990), aff'd, 501 U.S. 868 (1991)	6, 8, 9
501 U.S. 868 (1991)	4, 6, 10, 11
Given v. *Commissioner*, 238 F.2d 579 (8th Cir. 1956)	9
Louisville Builders Supply Co. v. *Commissioner*, 294 F.2d 333 (6th Cir. 1961)	9
Rosenbaum v. *Commissioner*, 45 T.C.M. (CCH) 825 (1983), rev'd *sub nom. Stone* v. *Commissioner*, 865 F.2d 342 (D.C. Cir. 1989)	7
Stone v. *Commissioner*, 865 F.2d 342 (D.C. Cir. 1989)	7, 10

Statutes and rules:

Internal Revenue Code (26 U.S.C.):	
§ 6653(a)(1)	2
§ 6653(a)(2)	2
§ 6661	2
§ 7443A	5, 9
§ 7443A(b)(4)	2, 5
§ 7443A(c)	3, 5
§ 7459(a)	5

Rules—Continued: Page

Tax Ct. R.:
Rule 151(e)(3) 8
Rule 155 3
Rule 182 (1979) 8
Rule 182(b) (1979) 8
Rule 182(c) (1979) 8
Rule 183 ..... 6, 7, 8, 9
Rule 183(c) 5, 7, 8

Miscellaneous:

Amendments to Rules of Practice and Procedure of the United States Tax Court:
71 T.C. 1177 (effective May 1, 1979) 8
81 T.C. 1043 (effective Jan. 16, 1984) 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-27a) is reported at 46 F.3d 1470. The opinion of the Tax Court (Pet. App. 49a-119a) is unofficially reported at 62 T.C.M. (CCH) 1. The supplemental memorandum of the Tax Court (Pet. App. 35a-48a) is unofficially reported at 64 T.C.M. (CCH) 10. The second supplemental memorandum opinion of the Tax Court (Pet. App. 30a-34a) is unofficially reported at 65 T.C.M. (CCH) 1786.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1995. The petition for rehearing was denied on April 25, 1995 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Commissioner of Internal Revenue determined deficiencies in petitioner's income tax for the years 1981, 1982, and 1983. Additions to tax under Sections 6653(a)(1), 6653(a)(2), and 6661 of the Internal Revenue Code were also asserted (Pet. App. 50a). Petitioner sought review of the asserted deficiencies in the Tax Court. Acting under the authority provided by Section 7443A(b)(4) of the Code, the Chief Judge of the Tax Court assigned the case to Special Trial Judge Gussis for hearing and for preparation of a report (Pet. App. 49a).

At the conclusion of the trial, Special Trial Judge Gussis submitted proposed findings of fact and a proposed opinion to the Chief Judge. The case was then assigned to Tax Court Judge Scott for disposition. On July 1, 1991, Judge Scott formally adopted the special trial judge's proposed findings of fact and opinion (Pet. App. 49a). The opinion sustained the Commissioner's determinations of deficiencies, additions to tax and interest (*id.* at 115a-119a).

2. Petitioner filed a motion for reconsideration in which he contended that, by adopting the special trial judge's report on the same day that it was filed with the court, the Tax Court effectively permitted the special trial judge—rather than the regular Tax Court judge—to decide the case. Petitioner con-

tended that the decision was therefore entered in a manner inconsistent with Section 7443A(c) of the Code, which specifies that cases involving more than $10,000 may be referred to special trial judges for hearing and reports but must be decided by the regular Tax Court judges. See 26 U.S.C. 7443A(c).

At a hearing on petitioner's motion for reconsideration, Judge Scott responded to petitioner's concern (C.A. Excerpts of Record 797):

> That is what the record shows because that is what is done for record-keeping in the Court. * * * The actual case was sent in to me at least five and probably six weeks before July 1 * * * and I did the work I considered necessary on it. * * * I just didn't want to leave any impression that I was able to adopt an opinion like this with one day's work. * * * It obviously is not possible on this one and was not done.

Judge Scott further stated, "I did rely on the Special Trial Judge's findings, although, I didn't just take them carte blanche" (*id.* at 801).

In a supplemental memorandum opinion, the Tax Court reaffirmed its essential conclusions but determined that petitioner was entitled to some of the deductions that he had claimed (Pet. App. 35a-48a). Petitioner and the Commissioner then disagreed about the appropriate computations under Tax Court Rule 155. In a Second Supplemental Memorandum Opinion, the Court adopted the Commissioner's proposed computation (Pet. App. 30a-34a).

3. On appeal, petitioner challenged the merits of the Tax Court decision and argued that the case should be remanded to the Tax Court for further proceedings. In support of the request for a remand,

petitioner claimed that Judge Scott improperly allowed the special trial judge to decide the case.

The court of appeals upheld the Tax Court decision on the merits (Pet. App. 27a) and also rejected petitioner's request for remand (*id.* at 18a). In particular, the court rejected petitioner's claim that the special trial judge was improperly permitted to make the decision of the Tax Court because the parties were not given an opportunity to file objections to the special trial judge's report and recommendations. The court agreed that "permitting the litigants to file objections to the special [trial] judge's report might well decrease the danger that the tax court judge will simply endorse the report without review" (*id.* at. 16a). The court concluded, however, that, "absent such a procedure, the tax court judge will not necessarily abdicate her judicial responsibility" (*id.* at 17a). The court noted that "[t]he Supreme Court has cautioned specifically that '"rubber stamp" activity' on the part of the tax court judge is not to be assumed" (*ibid.*, quoting *Freytag* v. *Commissioner*, 501 U.S. 868, 872 n.2 (1991)).

The court also rejected petitioner's factual contention that Judge Scott did not adequately review the case. The court noted that "Tax Court Rule 183 requires Judge Scott to give 'due regard' to [Special Trial] Judge Gussis' report on findings of facts and credibility" and that "Judge Scott made clear that while she did rely on Judge Gussis' findings, she did not 'take them carte blanche'" (Pet. App. 17a). The court observed that petitioner pointed to "isolated mistakes" made by Judge Scott in comments at the hearing on petitioner's motion for reconsideration but that "the few errors Judge Scott did make were understandable in light of the case's enormous

complexity" (*id.* at 17a-18a). The court concluded that "Judge Scott's other comments indicate a satisfactory understanding of the case" (*id.* at 17a) and that, "[a]fter carefully examining the record and Judge Scott's comments, we are convinced that Judge Scott's review of the case was adequate" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Section 7443A of the Internal Revenue Code authorizes the Chief Judge of the Tax Court to appoint special trial judges and to assign certain types of cases to them for hearing and adjudication. Under Sections 7443A(c) and 7459(a), however, only a regular Tax Court judge, and not a special trial judge, may decide a case that is assigned to a special trial judge for hearing under Section 7443A(b)(4). In particular, although a case involving more than $10,000 may be assigned to a special trial judge for hearing under 26 U.S.C. 7443A(b)(4), only a regular Tax Court judge may decide such a case.

For cases involving more than $10,000, Tax Court Rule 183(c) provides:

> The Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of

> witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

Petitioner asserts that the "requirement that the Tax Court judge decide the case cannot be met if a deferential standard, and certainly not if a clear error standard of review, is used" (Pet. 11). The Fifth Circuit rejected that argument, however, in *Freytag* v. *Commissioner*, 904 F.2d 1011, 1015 (1990), aff'd, 501 U.S. 868 (1991). In *Freytag*, the court of appeals stated that "[o]ur analysis begins and ends with the simple fact that the opinion in this case was issued by the Tax Court in the name of the chief judge. The chief judge had both the obligation and power to maintain full responsibility for the decision in this case." 904 F.2d at 1015. The court further noted that, "[a]lthough Tax Court Rule 183(c) indicates that the special trial judge's recommended findings of fact shall be presumed correct, it is the division of the Tax Court to which the case is formally assigned that controls the outcome of the case." 904 F.2d at 1015 n.8. In affirming the Fifth Circuit's decision in *Freytag*, this Court noted that the argument that the deferential standard of review under Tax Court Rule 183 allows the special trial judge effectively to decide the case was "not relevant to [the] grant of certiorari" (501 U.S. at 874 n.3). The Court nonetheless observed that "under § 7443A(c) a special trial judge has no authority to decide a case assigned under subsection (b)(4)." 501 U.S. at 875 n.3.

Petitioner fails to recognize that Tax Court Rule 183 does not limit Tax Court judges to review of a special trial judge's report for "clear error." Instead, Rule 183 provides that the Tax Court judge respon-

sible for deciding a case may adopt, modify, or reject the special trial judge's report in whole or in part, may request additional briefing, and "may receive further evidence." That authority obviously differs from "clear error" review, under which an appellate tribunal reviews findings of fact merely to determine whether the record permits the conclusions that the fact-finder reached. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-574 (1985).

Petitioner relies (at Pet. 11-14) upon the last sentence of Rule 183, which states that "[d]ue regard" shall be given to credibility determinations of the special trial judges and that "findings of fact recommended by the Special Trial Judge shall be presumed to be correct." The last sentence of Rule 183, however, does not limit the regular Tax Court judge deciding the case to "clear error" review, and has not been so understood by the Tax Court. In *Rosenbaum* v. *Commissioner*, 45 T.C.M. (CCH) 825 (1983), rev'd *sub nom. Stone* v. *Commissioner*, 865 F.2d 342 (D.C. Cir. 1989), the Tax Court held that "the presumptive correctness of the Special Trial Judge's report does not impair nor dilute our duty of bearing the ultimate responsibility for determining matters before us." 45 T.C.M. (CCH) at 827. Although the United States Court of Appeals for the District of Columbia Circuit in *Stone* stated that the "presumption of correctness" under Rule 183(c) indicates a "relatively high level of deference" which the court analogized to "clearly erroneous" review (865 F.2d at 344), the Tax Court has never acquiesced in that view and has not retreated from the position it took in *Rosenbaum*.

Since 1984, the Tax Court has declined to furnish a copy of the special trial judge's report to litigants

and does not routinely invite the parties to file exceptions to that report.[1] As the Fifth Circuit stated in *Freytag* v. *Commissioner*, 904 F.2d at 1015 n.8, "this change in rules, in our view, confirms that the Tax Court's relationship with its special trial judges cannot be analogized to typical appellate review."

The fact that Rule 183(c) provides that "[d]ue regard" should be given to the special trial judge's credibility determinations and that his findings of fact shall be "presumed to be correct" does not impede the independence of the decision made by the regular Tax Court judge assigned to the case. The Rule requires the regular judge to start with the facts found by the special trial judge before considering the parties' proposed findings of "essential fact" under Tax Court Rule 151(e)(3). That practice is similar to the practice followed by this Court in cases where Special Masters are appointed (*Colorado* v. *New Mexico*, 467 U.S. 310, 317 (1984)):

> Though the Master's findings on these issues deserve respect and a tacit presumption of correctness, the ultimate responsibility for

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[1] Prior to 1984, Tax Court Rule 182(b) provided for service of a copy of a special trial judge's report on each party at the time of the filing of the report with the court, and Rule 182(c) expressly permitted a party to file exceptions to the report within 45 days. See Amendments to Rules of Practice and Procedure of the United States Tax Court, 71 T.C. 1177, 1214 (effective May 1, 1979). In 1984, Rule 182 was redesignated as the current Rule 183, and the provisions for service of the special trial judge's report and the filing of exceptions were deleted. See Amendments to Rules of Practice and Procedure of the United States Tax Court, 81 T.C. 1043, 1069-1070 (effective Jan. 16, 1984).

> deciding what are correct findings of fact remains with us.

As the Fifth Circuit correctly concluded in *Freytag*, notwithstanding the "presumption of correctness," the Tax Court judge to whom the case is assigned "controls the outcome of the case." 904 F.2d at 1015 n.8.

2. Petitioner argues that Section 7443A of the Code and this Court's decision in *Freytag* v. *Commissioner* require (i) that Tax Court litigants have an opportunity to file objections to the special trial judge's report and (ii) that the Tax Court judge to whom the case is assigned hold a hearing on the objections "under procedures similar to those provided in the Federal Rules of Civil Procedure for the district court review of special master and magistrate reports" (Pet. 14). Rule 183 itself, of course, does not contemplate the filing of objections to the report. The Rule does provide, however, that the Tax Court judge may "adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions."

It has long been recognized that the Tax Court has the inherent right "to make reasonable rules of pleading and practice for the orderly hearing and determination of cases before it" (*Given* v. *Commissioner*, 238 F.2d 579, 583 (8th Cir. 1956)). See also *Louisville Builders Supply Co.* v. *Commissioner*, 294 F.2d 333, 339 (6th Cir. 1961). "The Tax Court is of course free to make its own rules determining the relation between it and its Special

Trial Judges." *Stone* v. *Commissioner*, 865 F.2d at 347. As the court of appeals noted, "permitting the litigants to file objections to the special [trial] judge's report might well decrease the danger that the tax court judge will simply endorse the report without review" (Pet. App. 16a). But " 'rubber stamp' activity" on the part of the Tax Court judge assigned to the case is not to be presumed. *Freytag* v. *Commissioner*, 501 U.S. at 872 n.2. Thus, even though the Tax Court does not apply procedures identical to those applied in federal district court in reviewing reports of special masters and magistrates, there is no basis for assuming that a Tax Court judge will "abdicate her judicial responsibility" (Pet. App. 17a).

In this case, the record establishes that Judge Scott conducted a thorough, independent review of the record and the law and that she, and not Special Trial Judge Gussis, decided this case. Judge Scott stated in open court that she reviewed all of the relevant testimony and documents and that she did not blindly adopt the findings of the Special Trial Judge or give them "carte blanche" (Pet. App. 17a).[2] It was only

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[2] Petitioner erred below in assuming that Judge Scott entered her opinion on the same day that the special trial judge forwarded the recommended opinion. As Judge Scott explained, the recommended opinion was submitted to her, along with the balance of the file of the case, several weeks before she issued her opinion in this case. See page 3, *supra*. In *Freytag* v. *Commissioner*, 501 U.S. at 872 n.2, the taxpayer also "place[d] some emphasis" on the fact that the Tax Court appeared to have adopted the report of the special trial judge on the same day that it was filed with the court. As this Court stated, however, "this chronology does not appear to us to be at all significant. * * * The burden of proof as to any negative

after a thorough and independent review of the record and applicable law that Judge Scott adopted and entered the proposed opinion as her own (Pet. App. 49a).

It is also obvious that petitioner had ample opportunity to make his position known to the Tax Court judge assigned to this case. Petitioner filed a 283-page opening brief, a 321-page reply brief, and a 141-page surreply brief to guide the court in its factual findings and legal conclusions. Petitioner's briefs, along with the entire record of the case, were submitted to Judge Scott when the case was assigned to her for disposition. In addition, petitioner had the opportunity to file, and did file, motions for reconsideration and to vacate the decision. Those motions were considered and ruled upon by Judge Scott.

Because Judge Scott made a thorough, independent review of the record and applicable law, because petitioner had ample opportunity to address the issues to the court and to make its position known, and because Judge Scott (rather than the special trial judge) made the final decision in this case, the court of appeals correctly concluded that there was no reason to remand the case to the Tax Court (Pet. App. 18a). Petitioner acknowledges (Pet. 10) that the decision of the court of appeals in this case does not conflict with any other decision.

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inference to be drawn from the time factor rests on petitioners. We are not inclined to assume 'rubber stamp' activity on the part of the Chief Judge." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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